

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

STEVEN EUGENE WELLS,)	
)	No. CV 09-189-HU
Plaintiff,)	
)	
v.)	
)	FINDINGS AND
STATE OF OREGON, STATE OF)	
OREGON BOARD OF PAROLE AND)	RECOMMENDATION
POST PRISON SUPERVISION,)	
STEVEN POWERS, DARCY BAKER,)	
CANDACE WHEELER, WASHINGTON)	
COUNTY, WASHINGTON COUNTY)	
CORRECTIONS, CENTER FOR)	
BEHAVIORAL INTERVENTION,)	
STEVE JENSEN, AND DOES 1-100,)	
INCLUSIVE,)	
)	
Defendants.)	
_____)	

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Pro se

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 Intervention

9 HUBEL, Magistrate Judge:

10 Plaintiff Steven Wells brings this action against the State of
 11 Oregon, the Oregon Board of Parole and Post Prison Supervision (the
 12 Board), and Board members Steven Powers, Darcy Baker, and Candace
 13 Wheeler (collectively, the state defendants), Washington County and
 14 Washington County Corrections (collectively, the county defendants)
 15 and the Center for Behavioral Intervention, Steve Jensen, and John
 16 Does 1-100 (collectively, the private defendants). He seeks
 17 injunctive and monetary relief. Wells filed an ex parte motion for
 18 a temporary restraining order, which was denied by Judge Mosman of
 19 this court on February 20, 2009 (doc. # 5).

20 Wells was convicted on May 24, 2001, of two counts of sexual
 21 abuse of a minor. On July 27, 2007, Wells filed a petition for writ
 22 of habeas corpus in this court, Wells v. Howton, 07-1117-TC.

23 Wells served 75 months in prison, and was released on August
 24 2, 2007. Affidavit of Steven Wells ¶¶ 4, 9; Complaint, Exhibit 1.
 25 Upon his release from prison, Mr. Wells was required by the Oregon
 26 Board of Parole and Post Prison Supervision (Board) to enroll in

1 and complete a Sex Offender Treatment Program (Program). Wells
2 Affidavit ¶ 10.

3 Wells brought this action on February 17, 2009, asserting
4 three claims under 42 U.S.C. § 1983. The first is for violation of
5 the Takings and Due Process Clauses of the Fifth and Fourteenth
6 Amendments, based on Wells's being required to attend and pay fees
7 associated with the Program, despite Wells's insistence that he is
8 innocent of the conviction. Complaint ¶¶ 14, 16, 17. The second is
9 for violation of the Fifth and Fourteenth Amendments, based on the
10 assertion that Wells's rights against self-incrimination have been
11 violated because the Program requires him to admit committing the
12 crimes as a condition of successful completion. Id. at ¶¶ 20, 21,
13 23, 24, 25, 26. The third is that the Oregon statute governing
14 conditions of post prison supervision relating to sex offender
15 treatment programs, Or. Rev. Stat. § 144.102(3)(f), is overbroad
16 and violates the United States Constitution. Id. at ¶¶ 29, 30. The
17 gravamen of this case is Wells's challenge to the defendants'
18 requiring him participate in the Program, including admitting the
19 crimes, undergoing treatment, and paying associated fees. Wells
20 seeks an injunction prohibiting the Board from ordering him to
21 participate in and complete the Program, and reimbursement for
22 \$2,980 in fees.

23 In March 2009, the three groups of defendants filed motions to
24 dismiss. On April 24, 2009, Wells filed a motion for leave to amend
25 the complaint to allege that on March 3, 2009, he was terminated
26 from treatment in the Program for noncompliance, and as a result,
27

1 the Board imposed a sanction of six weekends in jail, between April
2 24, 2009 and May 31, 2009. Plaintiff's Motion to Amend, Exhibits 1,
3 2. Wells seeks to allege these additional facts, although it
4 appears that the sanction of six weekends in jail was not carried
5 out. On April 29, 2009, a Board hearings officer determined that
6 Wells did not willfully violate his post prison supervision
7 conditions and recommended that Wells enroll in a sex offender
8 treatment program that did not require admission of the original
9 defense. Brodeen Declaration Exhibit 2. On May 22, 2009, the Board
10 agreed that Wells had not violated his post prison supervision
11 conditions. Id.

12 In any event, the state defendants do not oppose the motion to
13 amend. The county defendants have filed no response to the motion.
14 The private defendants acknowledge that the proposed amendments do
15 not implicate them, but oppose the motion solely on the ground that
16 the "filing of another complaint containing the same frivolous
17 allegations against these Defendants will unnecessarily add to the
18 cost of defense." The motion to amend is granted.

19 Wells renewed his ex parte motion for a temporary injunction
20 against enforcement of the Board's conduct and sought to preclude
21 the enforcement of the sanction of six weekends in jail. The motion
22 was denied by Judge Haggerty of this court on April 24, 2009. (Doc.
23 # 32). However, as noted above, the Board ultimately concluded that
24 Wells had not violated his post prison supervision conditions.

25 On May 9, 2009, Magistrate Judge Coffin entered Findings and
26 a Recommendation that Wells's habeas petition be dismissed. (Doc.

32). Wells filed objections to the Findings and Recommendation on May 20, 2009 (Doc. # 33).

Standard

On a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court accepts as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them. Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003). Factual allegations must be sufficient to raise a right to relief above the speculative level. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Discussion

1. State defendants' motion

The state defendants assert that Wells cannot maintain a claim under 42 U.S.C. § 1983 because neither the state, nor its agencies, nor the individual officials named as defendants, are amenable to suit under § 1983. Section 1983 applies to "persons," and the Supreme Court has held that a state is not a "person" for purposes of a civil rights action under § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989); Lapides v. Board of Regents, 535 U.S. 613 (2002); Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997).

If a state agency is an "arm of the state," it is not considered a person under § 1983. Howlett v. Rose, 496 U.S. 356, 365 (1990) ("the State and arms of the State ... are not subject to suit under § 1983..."). In determining whether an entity is an arm of the state, the court inquires whether "the state is the real,

1 substantial party in interest and is entitled to invoke its
2 sovereign immunity from suit even though individual officials [or
3 state entities] are nominal defendants." Streit v. County of Los
4 Angeles, 236 F.3d 552, 566 (9th Cir. 2001 quoting Durning v.
5 Citibank, 950 F.2d 1419, 1423 (9th Cir. 1991) and Ford Motor Co. v.
6 Dep't of Treasury, 323 U.S. 459, 464 (1945).

7 An action for money damages or retrospective relief brought
8 against a state official in his or her official capacity is not a
9 suit against the official, but against the office, and therefore is
10 not different from a suit against the state itself. Will, 491 U.S.
11 at 71. However, claims for prospective injunctive relief against
12 state officials in their official capacity are not barred. Id. at
13 n. 10. Wells has requested an injunction "prohibiting the Board
14 from ordering him to enter and complete a Sexual Offender Treatment
15 program..." Complaint ¶ 18.¹

16 The state defendants also assert that this action is barred by
17 sovereign immunity, since the Eleventh Amendment bars citizens from
18 bringing actions against a state, state officials, or a state
19 agency acting as an arm of the state unless immunity is expressly
20 waived by the state or abrogated by Congress. Seminole Tribe of
21 Florida v. Florida, 517 U.S. 44, 54 (1996).

22 The court finds it unnecessary to reach the questions of
23 whether the Board is an arm of the state for purposes of this

24
25 ¹Such relief may be moot in any case, in view of the
26 affidavit from Wells indicating that he has been terminated from
27 the Program. He has been ordered into another program, albeit one
that does not require admission of the crime for which he has
been convicted.

1 action, or whether the action against the individual defendants for
2 injunctive relief will lie, because Wells's § 1983 action is in any
3 case barred by the "favorable termination" rule articulated by the
4 Supreme Court in Heck v. Humphrey, 512 U.S. 477 (1994). In that
5 case, the Court held that a § 1983 action whose successful
6 prosecution would negate an element of the offense of which the
7 plaintiff has been convicted cannot lie.

8 [I]n order to recover damages for allegedly
9 unconstitutional conviction or imprisonment, or for other
10 harm caused by action whose unlawfulness would render a
11 conviction or sentence invalid, a § 1983 plaintiff must
12 prove that the conviction or sentence has been reversed
on direct appeal, expunged by executive order, declared
invalid by a state tribunal ... or called into question
by a federal court's issuance of a writ of habeas corpus.

13 Id. at 486-87. See also Wilkinson v. Dotson, 544 U.S. 74, 82
14 (2005). Thus, if a criminal conviction arising out of the same
15 facts still stands and is fundamentally inconsistent with the
16 conduct complained of under § 1983, the action must be dismissed.
17 Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996).

18 Defendants argue that because Wells was convicted of sex
19 abuse, his § 1983 claims, all of which are based on his right to
20 assert his innocence of the charges, would necessarily imply the
21 invalidity of his conviction. I agree. I recommend that the state
22 defendants' motion to dismiss be granted.

23 2. County defendants

24 The county defendants challenge Wells's claims on several
25 grounds, including 1) that requiring fees for sex offender
26 treatment as a condition to parole is not a property interest
27 protected under the Takings Clause; 2) Wells has failed to allege

1 facts sufficient to support a claim for violation of his right
2 against self-incrimination because there is no threat of future
3 criminal prosecution as a result of admitting guilt; and 3)
4 conditions of parole and sanctions for non-compliance rest
5 exclusively with the Board under Or. Rev. Stat. § 144.101. It is
6 unnecessary to reach these arguments because all of Wells's claims
7 are barred under Heck. The claims against the county defendants
8 should be dismissed.

9 3. Private defendants

10 The private defendants contend that the claims against them
11 should be dismissed because Wells has not alleged any facts showing
12 that they were persons acting under color of state law. Individuals
13 and private entities are not normally liable for violations of
14 constitutional rights. Morse v. North Coast Opportunities, Inc.,
15 118 F.3d 1338, 1340 (9th Cir. 1997). To maintain a cause of action
16 based on an allegation of constitutional violations, the plaintiff
17 must show that the actions complained of are "fairly attributable"
18 to the government. Id. Wells has not alleged such facts against the
19 private defendants. The allegations of the complaint are that the
20 Board required him to enter and complete the Program and that the
21 Program requires him to admit guilt on the underlying offense "in
22 order to obtain extended liberties and complete the program."
23 Complaint ¶ 23. Wells states that he was ordered to enter and
24 complete the Program by his Parole Officer and by the Board.

25 _____The only allegations in the complaint directly against
26 defendants CBI and Jensen, and unnamed defendant Jaime Chavez,
27

1 appear in paragraph 14. There, Wells alleges:

2 Plaintiff has been told by his Parole Officer, as well as
3 both Steve Jensen and Jaime Chavez of CBI, that he will
4 not successfully complete any Sexual Offender Treatment
program as he continues to maintain his actual innocence.

5 These allegations do not support any constitutional claim that
6 could subject the private defendants to joint liability with the
7 state and county defendants.

8 **Conclusion**

9 I recommend that plaintiff's motion to amend the complaint
10 (doc. # 31) be GRANTED. I recommend that the state defendants'
11 motion to dismiss (doc. # 16) be GRANTED. I recommend that the
12 county defendants' motion to dismiss (doc. # 24) be GRANTED. I
13 recommend that the private defendants' motion to dismiss (doc. #
14 22) be GRANTED.

15 **Scheduling Order**

16 These Findings and Recommendation will be referred to a
17 district judge. Objections, if any, are due August 11, 2009. If no
18 objections are filed, then the Findings and Recommendation will go
19 under advisement on that date.

20 If objections are filed, then a response is due August 25,
21 2009. When the response is due or filed, whichever date is earlier,
22 the Findings and Recommendation will go under advisement.

23 Dated this 27th day of July, 2009.

24
25 /s/ Dennis James Hubel
Dennis James Hubel
26 United States Magistrate Judge
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